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**Controlling Regulatory Bureaucracies:  
Lessons from the American Experience**

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**DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES**

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Controlling Regulatory Bureaucracies: Lessons from the  
American Experience

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1. The Control Problem in Policy Making

Like all basic questions of democratic theory, controlling bureaucratic discretion and enforcing political accountability are not problems that can be solved once and for all. Each new generation of scholars and practitioners is forced to grope for solutions appropriate to the ever-changing context in which the problems arise. Hence the central position which the issue of control occupies in Renate Mayntz's writings on bureaucracy and policy making. Especially in the classic study of policy making in the German federal bureaucracy conducted with Fritz Scharpf, the key dimensions and dilemmas of the control problem in the process of policy formation are clearly identified.

On the one hand, when they develop policy initiatives and draft programs, top and middle-level bureaucrats do not actually implement objectives set by political executives; rather, they concretely define such objectives. This is because when general objectives are refined and operationalized, they shade into specific proposals. Hence the finding, so surprising at first sight, that "in the federal departments all hierarchical levels are doing qualitatively more or less the same thing with respect to policy-making, except that they do it on the basis of different sets of information, with a different breath of horizon and with different decision criteria" (Mayntz and Scharpf 1975:98-99).

In other words, contrary to what is implied by the traditional dichotomy of policy and administration, it is not the case that policy settles everything down to a certain point, while administration deals with everything

below that point. Policy and administration do not occupy two separate spheres of action, nor are they the responsibility of two completely separate groups of people. Goal setting is not the prerogative of political executives, nor do administrators and experts deal only with means. One important reason for this is that information is asymmetrically distributed, with the top lacking the knowledge not only to formulate feasible alternatives, but sometimes even to evaluate them. It follows that a topdown process of policy making where administrators would "derive specific programs deductively from general policy goals defined at the top is practically impossible, and undesirable too" (ib.:99).

On the other hand, also a bottom up approach in which the political executives would renounce the responsibility of formulating general policy goals, is impossible -- since bureaucrats do not have the requisite information and decision criteria -- and also undesirable, since it would greatly complicate the problem of political accountability. The dilemma is resolved by proposing a "dialogue model" of policy making -- a model that, as is so often the case in the social sciences, is at the same time normative and descriptive, and which anticipates by more than a decade currently popular ideas about policy deliberation and discursive democracy (Reich 1988; Shapiro 1988; Majone 1989a; Dryzek 1990). In this model, the different levels of the organization are involved in a permanent discussion with each other, so that the directives coming from the top are shaped by the perceptions of problems, possible solutions and situational constraints coming from below, while these directives in turn structure perceptions and the search for solutions at lower levels (Mayntz and Scharpf 1975:100).

## 2. Changing Views on the Possibility of Controlling Bureaucracy



The dialogue model expresses a positive assessment of the possibility of political control of the bureaucracy. Far from attempting to evade or subvert the goals of political executives, bureaucrats, at any rate German ones, do their best to inform themselves of the intentions, wishes and opinions of their political bosses, and to anticipate their reactions to new policy proposals. In addition to engaging in direct exchanges of opinion with their political superiors, bureaucrats "carefully read public speeches and public interviews of the minister and the state secretaries, and analyze every incidental remark they make. Important sources of orientation are the programmatic pronouncements made in the government declaration of the beginning of the new legislative period, and official reports which a number of ministries prepare to document their achievements and state future aims" (ib.:101).

These findings agree with the conclusions of the most recent American literature on political control, but contradict older and still widely accepted theories. Most studies conducted before the 1980s saw neither the president nor Congress as effective institutions for central control of the bureaucracy. Several presidential studies came to the conclusion that, in general, presidents lack the resources and also the interest to monitor and control the federal bureaucracy effectively (Rossiter 1956; Fenno 1959; Neustadt 1960; Noll 1971). Similarly, the literature on Congress described difficulties with legislative control mechanisms. For example, a well known empirical study of congressional committee members as agency overseers found that members of Congress are concerned more with satisfying electors than with overseeing the bureaucracy (Scher, 1960). Other studies raised questions about the quality of Congressional control noting that it is uncoordinated, fragmented and ad hoc.

Several other strands of theory, seemingly unrelated, seemed to point to the same negative assessment of the



possibility of political control. First, empirical studies of the budgetary process pioneered by Wildavsky (1964) found that the allocation of public resources is guided by simplifying decision rules rather than by rational comparisons of costs and benefits as a means of controlling and coordinating public policy. Budgeting, according to these studies, is decentralized and incremental, resulting in automatic increases that further insulate the bureaucracy from political control.

Also Niskanen's formal model of the budget maximizing bureaucrat emphasized the difficulty of political control (Niskanen 1971). In the relationship between the legislature that makes the budgetary allocations and the bureaucratic agency that provides public goods, the latter has the upper hand. This is because the agency knows the legislature's demand for its services, while the legislators do not know the true cost function of the agency. Knowing the legislature's demand function, the agency can engage in price discrimination and charge the maximum price the legislature is willing to pay. As a result, the agency's budget is too large, and the politicians will realize no benefits from the exchange. No effective political control is possible under the assumptions made by the model.

Finally, the capture theory popularized by Stigler (1971) and other economists of the Chicago school, attempted to show that bureaucracy responds to the wishes of the best organized interest groups rather than to political directives or to some abstract notion of the public interest. In fact, Stigler's model ignores the fact that regulators are usually agents of a political executive or legislature, not elected politicians. Hence, regulatory capture is asserted rather than proved.

In the 1980s views about the possibility of political control of bureaucracy began to change for a number of theoretical and practical reasons: new developments in



formal modelling of the control problem; more sophisticated statistical analyses correlating time series of agency outputs with various indicators of the preferences of political principals; greater attention to the design of control mechanisms as a practical application of the theory of "new institutionalism" in economics and political science; but also the rise to power of political leaders like President Reagan and Mrs. Thatcher committed to the goal of rolling back the state and reducing the role of public bureaucracies.

Among the most significant theoretical developments of the 1980s are the applications of the economics of organization and in particular of agency theory (or principal-agent models) to the study of bureaucratic discretion. The starting point of agency theory is that in a principal-agent relationship information is asymmetrically distributed. The agent usually has more information than the principal about the details of the tasks assigned to him, as well as about his own actions, abilities and preferences. Agents can take advantage of the high costs of measuring their characteristics and performance to engage in opportunistic behavior. Such behavior imposes costs on the principal who finds it in her interest to monitor agent's behavior and structure the contract in a way that reduces "agency costs".

Applications of agency theory to the problem of political control make two key assumptions (Wood and Waterman 1991: 802-03). First, bureaucratic agents are bound by contract to serve democratic principals; their primary duty is faithful implementation of the law. Second, through time the interests of politicians and bureaucrats tend to diverge. This is because political coalitions change from those existing when democratic principals adopted a certain policy, and because bureaucracies develop separate interests through institutionalization and external pressures.

Thus when politicians try to control policy implementation, bureaucrats will often try to shirk their demands. The question is how (whether) politicians can overcome this shirking tendency as well as the tendency of bureaucrats to use their information advantages to manipulate the choice sets of their political superiors. Agency theory suggests that sophisticated politicians recognize these dangers and can take countermeasures. Political control is possible because elected principals create bureaucracies: "They design bureaucracies with incentive structures to facilitate control. Political principals also monitor bureaucratic activities to offset information imbalances. When bureaucratic activities stray from the desired result, policy makers apply sanctions or rewards to bring them back in line. Thus, the theory is dynamic, positing well-informed central decision makers who systematically mold the preferences of bureaucratic agents" (ib.:803).

In fact, several empirical studies carried out during the 1980s found evidence of the capacity of democratic institutions to control policy formulation and implementation. For example, Moe (1982) analyzed annual outputs from the Federal Trade Commission (FTC), the National Labor Relations Board (NLRB) and the Securities and Exchange Commission (SEC) and found that they varied with changing presidential administrations. In a later study, the same author, using quarterly data on NLRB decisions, found that they were influenced by all three major political institutions -- the president, Congress and the courts (Moe 1985).

The importance of congressional control is emphasized by Weingast and Moran (1983). Using annual data on FTC decisions, these authors show that the policy preferences of members of Congressional committees with oversight responsibilities play an important role in determining the agency's actions: shifts in these preferences are what



causes changes in agency policy. Similarly, in a detailed legislative and legal history of antitrust policy making from 1969 to 1976, Kovacic (1987) argues that the FTC, rather than ignoring congressional preferences as suggested by older theories, chose antitrust programs that were consistent with and responsive to the policy preferences of its oversight committees in Congress.

On the other hand, a study of the FTC during the period 1981 to 1984 when President Reagan attempted to introduce major regulatory reforms -- including reduction of the agency's budget, application of cost-benefit tests to justify agency's actions, and adoption of a less confrontational approach to compliance -- found that despite some success in reducing the budget of the agency, the reform agenda remained only partially implemented by 1984. This was due mainly to Congressional opposition to budget cuts. No longer able to use budget increases to induce the agency to comply with their wishes, the appropriations committees used legislative language in budget resolutions to impose performance standards specifying precisely both those activities to be provided and those not to be provided by the FTC (Yandle 1987).

### 3. Political Control with Multiple Principals

The economic theory of agency is used mainly to analyze hierarchical relationships. The studies mentioned above, and especially Yandle's conclusions, suggest that in order to be applicable to the problem of political control, the theory must be extended to include the case of multiple principals -- democratic principals but perhaps also client and interest groups. In turn, a more general theory raises a number of new questions concerning, for example, the relative influence of different principals, the effectiveness and efficiency of various instruments and strategies of control, and the possibility of coalitions between bureaucrats and subsets of principals. Recent

research, both theoretical and empirical, is beginning to provide answers to such questions.

As noted above, agency theory would predict that among principals, legislators are the most influential ones, since it is statutes that create bureaucracies and provide the structure of incentives that should minimize the divergence between legislative intentions and bureaucratic outputs. This is in fact the opinion of many scholars, especially, of course, those specializing in legislative politics. The conclusion reached by Herbert Kaufman in his detailed study of a half dozen federal bureau chiefs, namely that "no other external group or institution enjoyed quite so commanding a position as Congress" (Kaufman 1981:165), still enjoys widespread support. However, it has been noted that legislators find it more efficient under severe time constraints to monitor bureaucratic performance indirectly rather than through oversight hearings; to a large extent, they rely on program recipients, lobbyists and interest groups to provide information on bureaucratic performance (McCubbins and Schwartz 1984).

Compared to Congress, presidential control is more direct. The most important instrument of executive control appears to be the power of appointment and removal. For example, Wood and Waterman (1991:804) note that "[t]he Reagan presidency more than any other epitomized the use of political appointments to affect political control. The Reagan transition team spent months screening those who would serve, emphasizing loyalty and ideology above all other attributes".

Other important instruments of executive control are administrative reorganizations and the ever-increasing use of the president's managerial arm, the Office of Management and Budget (OMB). The Wood and Waterman study of seven administrative agencies from the late 1970s through most of the 1980s probably represents the most detailed analysis to date of various control instruments including political



appointments, budget increases and decreases, congressional oversight hearings, administrative reorganizations, and legislation. All seven agencies appeared to be politically responsive, at least in the period examined. The data indicate that among the tools of political control, the power to appoint is the most effective and most frequently used: in five of the seven cases examined, agency outputs shifted immediately after a change in agency leadership. Reorganization, congressional oversight and budgeting are also important. The authors conclude that the evidence for active political control is so strong that controversy should now end over whether political control of the bureaucracy is possible. Instead, future research should concentrate on a detailed analysis of the various mechanisms of control (ib.:822).

In fact, a general model should include also factors not considered in the Wood and Waterman study, like the formal and informal influence of the public (e.g., through public hearings) and especially the role of the courts. An otherwise excellent paper by Jeffrey Hill (1985) shows how the practical value of theoretically interesting conclusions can be reduced by the omission of important variables. Using public-choice arguments Hill shows that bureaucrats can influence policy outcomes by colluding with previously latent legislative majorities. Specifically, in a complex situation where policies must be described by at least two dimensions, a senior bureaucrat can construct an implementation coalition that differs from the original legislative coalition. For this it is sufficient that the bureaucrat's preferred alternative be closer to the "ideal points" of a majority of legislators than the bill which they helped pass. Thus the discretion of the bureaucrat derives not from defying legislative intent but from the possibility of constructing new majorities. As Bendor (1990) notes, this is a very interesting result because it shows that bureaucratic discretion, and hence control

problems can arise even when information is complete. Problems can arise solely from the legislature's difficulty in reaching stable collective choices, without the need of making the standard assumption of agency theory that information is asymmetrically distributed between agent and principal(s). However, the model effectively assumes that the courts will not punish administrative deviations from a statutory mandate. On the other hand, if legislators know in advance that judicial review is very likely, they would be committed to the policy originally chosen. Hence the formal analysis conveys an impression of greater administrative discretion than is empirically plausible (Bendor 1990: 392-95).

A final, and for the purpose of this paper crucial question concerns the scope of political control of the bureaucracy: is the possibility of control limited to certain agencies -- perhaps those studied by the authors mentioned above -- or does it extend more generally? In the remainder of this paper I shall argue that in order to be effective, political control must rely on different mixes of instruments according to the nature of the bureaucracy to be controlled. In particular, regulatory agencies require more complex systems of control than central administrative offices. This distinction is particularly important in the European context where the growth of regulatory bodies is a more recent phenomenon than in America.

#### 4. The Independent Regulatory Commissions

In the study referred to above, Wood and Waterman note that "agency responsiveness and stability can roughly be arrayed along a continuum which aligns nicely with certain bureaucratic attributes. The agencies most responsive to executive influence, gauged by the magnitude and duration of change, were those situated in the executive departments... On the other hand, the agencies with the



most stable outputs were the independent regulatory commissions" (Wood and Waterman 1991: 823).

This is of course what one would expect since independent regulatory commissions (IRCs) were created by Congress precisely to ensure agency independence from presidential control and short-term political considerations. Although IRCs cover an extremely wide range of administrative activities -- from the control of prices, routes and service conditions of surface transportation companies by the Interstate Commerce Commission, created in 1887, to the licensing of nuclear power plants by the Nuclear Regulatory Commission, created in 1975 -- they all share some organizational characteristics that are meant to protect their decisional autonomy: they are multi-headed having five or seven members; they are bi-partisan; members are appointed by the president with the consent of the Senate and serve for fixed, staggered terms.

The IRCs are independent in the sense that --unlike the single-headed line agencies -- they operate outside the presidential hierarchy in making their policy decisions, although subject to the same budgetary review by the Office of Management and Budget (OMB) as line agencies. As the US Supreme Court asserted in Humphrey's Executor vs. United States (1935) commissioners can be removed from office only for official misbehavior, not for disagreement with presidential policy.

The degree of effective independence of the IRCs has changed in the course of their century-old history. In the earliest period and through the New Deal era, Congress was very strongly in favor of independence. Indeed, the independence of the important regulatory bodies created during the New Deal -- Federal Communications Commission, Securities and Exchange Commission, Civil Aeronautics Board -- was the price president F.D.Roosevelt had to pay for acceptance by Congress and the Supreme Court of far-reaching public intervention in the economy. The president

would have preferred to assign the new functions to executive departments under his immediate control; but this the other branches of government were not willing to accept (Shapiro 1988).

However, criticisms of the IRCs in the 1950s and 1960s for their lack of political accountability and their alleged tendency to be captured by private interests, produced a reaction in favor of presidential control. Legislative amendments changed the chairperson terms from fixed to service at the will of the president in most regulatory agencies, and gave the chairperson stronger administrative authority over the other commissioners. Thus the original collegiality of the IRCs has been substantially eroded. At the same time, however, Congress has increased the independence of the regulatory commissions by requiring that a number of IRCs submit their budget simultaneously to Congress and to the OMB, and by exempting some of the financial regulatory agencies from OMB clearance of their legislative proposals (Reagan 1987:51).

In the debate over the degree of independence which IRCs should enjoy, the majority of liberal scholars have traditionally supported presidential supervision of the regulatory process. Marver Bernstein, one of the most influential critics of the IRCs, maintained that isolation from the presidency results in a lack of presidential support which leads to capture of the regulators by the supposedly regulated industries: "Cut loose from presidential leadership in protection, the agencies must formulate policy in a political vacuum. Into this vacuum move the regulated interests themselves, and by infiltration overcome the weak regulatory defenses to become the strongest influences upon the regulator" (William D. Carey quoted in Bernstein 1955: 138-39).

Cass Sunstein adds three more reasons for presidential supervision. First, the president is accountable to a



national constituency. Hence, the president's supervisory role should increase the likelihood that discretionary decisions by regulatory agencies should respond to the national interest rather than to parochial pressures of members of Congress. Second, only the president can coordinate the entire regulatory process. This capacity is especially important in light of the proliferation of regulatory agencies with overlapping responsibilities. Finally, the president is able not only to coordinate, but also to direct regulatory policy in a way that would be difficult or impossible if that policy were set individually by agency officials. Presidential control allows the government to respond to shifts in public opinion, reducing the likelihood that politics will become routinized and heavily bureaucratized (Sunstein 1987: 452-53).

Because of the liberal critique of the IRCs, most of the regulatory bodies created in the 1970s -- agencies like the Environmental Protection Agency, the Occupational Safety and Health Administration or the National Highway Traffic Safety Administration -- were organized as single-headed executive agencies, either reporting directly to the president (the case of the EPA) or in the line of command from the president down through the executive-branch hierarchy. But, ironically, the most dramatic steps to ensure centralized direction of regulation have been taken not by Democratic presidents, but by president Reagan with two Executive Orders that concentrated supervisory authority in the Office of Management and Budget. Executive Order 12291, issued in 1981, permits OMB to review and comment on regulations proposed by executive agencies, testing the regulations to see that they are justified in cost-benefit terms.

Executive Order 12498, issued in 1985, went one step further, requiring agencies to submit for OMB approval an "annual regulatory plan" outlining proposed actions for the



next year. Such centralization and coordination were meant to ensure that policy would be managed by an institution with a view of the entire regulatory process. The emphasis on cost-benefit analysis was designed to discipline agency decisions by comparing the social benefits produced by regulation with its full costs, that is, not only the administrative costs of producing and enforcing the rules but, more important, the costs imposed on the economy by the regulatory requirements.

However, cost-benefit analysis is not an exact science, and it is easy to see how demands for an economic justification of agency decisions may be used to delay or even roll back regulatory programs which the president does not favor. This is precisely what happened under president Reagan. For example, in 1985 the OMB found that almost 30 percent of the agency rules it reviewed were not consistent with Executive Order 12291. It required changes in about 23 percent of the cases while the agencies themselves withdrew more than 3 percent of the rules (Sunstein 1987: 421). In addition, the OMB has been accused by environmentalists of having significantly delayed EPA regulations with which it did not agree. At the same time Congress, concerned about the mounting costs of social regulation -- environmental and consumer protection, health and safety at the workplace, equal opportunities for minorities, transportation policy for the disabled, and so on -- and the consequent threats to employment and to the international competitiveness of American industry, was not pushing the agencies very hard to implement the statutes of the 1970s.

##### 5. An Independent "Fourth Branch" of Government?

Faced by a reluctant Congress and by a president with strong antiregulatory views, some liberal scholars and representatives of public-interest groups began arguing that not only the IRCs but also agencies dealing with



social regulation should be viewed as a fourth branch of government not answerable to either Congress or president.

As Shapiro (1988: 108) writes:

If you don't trust Congress and know that the president is the enemy, who is left to love and nurture the health, safety and environmental legislation of the sixties and seventies? All that is left is the bureaucracy of the new federal agencies who were recruited only recently and retain their enthusiasm for doing what they were hired to do. They want to regulate in behalf of the great public values of health, safety, and environmental purity. So it becomes attractive to those favoring regulation to turn the federal bureaucracy into an independent branch of government. Such a branch would be free of the president, even free of the Congress of the eighties, but loyal to the sweeping statutory language of the sixties and seventies.

It is another irony of the recent history of regulation in America that the label "fourth branch of government" was used in the past to attack, rather than defend, administrative regulation for its lack of political accountability and its violation of the separation of powers theory. Thus, the President's Commission on Administrative Management (Brownlow Commission) noted in 1937 that the independent regulatory commissions "constitute a headless "fourth branch" of government, a haphazard deposit of irresponsible agencies and uncoordinated power. They do violence to the basic theory of the American Constitution that there should be three branches of government and only three " (cited in Litan and Nordhaus 1983: 50).

Indeed, the notion of an independent regulatory fourth branch appears at first sight highly problematic in view of the traditional separation of powers theory and of the constitutional position of the president as head of the executive branch and its agencies. Yet, today's advocates of an independent regulatory bureaucracy can produce a number of political and legal arguments to support their views. In terms of political philosophy, they can draw on strands of the American political tradition that emphasize the value of independent, non-majoritarian institutions, like the courts, for democratic government. There is, first, the Madisonian tradition that views insulation of government as a possible safeguard against "factionalism" - the usurpation of government by powerful and self-interested groups -- and the threats which factionalism poses to the republican belief in deliberative democracy. Also the tradition of the Progressive movement, represented by such political leaders as Theodore Roosevelt and Woodrow Wilson, attached great importance to the insulation of government from short-term party politics and electoral interests as a way of ensuring both efficiency and honesty in public affairs (Hofstadter 1955). Finally, the ideology of the New Deal defended the independence of the regulatory commissions as necessary to the acquisition and use of that expertise which was their raison d'être. Such commissions emerged and became important instruments of governance for industry precisely because Congress and the courts proved



unable to satisfy the "great functional imperative" of specialization. In the words of Merle Fainsod, regulatory agencies "commended themselves because they offered the possibility of achieving expertness in the treatment of special problems, relative freedom from the exigencies of party politics in their consideration and expeditiousness in their disposition" (Fainsod 1940: 313).

One must keep in mind that all regulatory agencies are created by congressionally enacted statutes. The programs they operate are created, defined and limited by such statutes. Hence, even though such agencies are responsible to the president as head of the executive branch of which they are part, their legal authority, their objectives and sometimes even the means to achieve those objectives are to be found in congressional statutes. In short, regulatory agencies have two bosses, not one, and as Martin Shapiro has observed, it is much easier to get out from under two bosses with ambiguous and contradictory authority than it is to get out from under one boss with clear authority.

To understand the institutional implications of the controversy over the fourth branch of government, another consideration is important. Since passage of the Federal Administrative Procedures Act (APA) in 1946, regulatory decision making has undergone a far-reaching process of judicialization. It will be remembered that the activities of regulatory agencies, commissions or boards include all three forms of state power: legislative (rule making),

judicial (adjudication) and executive (enforcement). Under APA, agency adjudication (a case-by-case, trial-type process for the formulation of an order) was made to look like court adjudication, including the adversarial process for obtaining evidence through presentations of the contending parties, and the requirement of a written record as the basis of agency decision. Clearly, these and similar procedural requirements greatly simplify judicial review of administrative adjudication.

On the other hand, APA requirements for rule making are less demanding: before promulgating a rule, the agency must provide public notice and opportunity for comments; when it promulgates the rule, it must supply a concise general statement of the rule's "basis and purpose"; the rule can be set aside by a court only if it is "arbitrary, capricious, or abuse of discretion" -- the "lunacy test", as this lax standard for judicial review has been called. Such difference in requirements for adjudication and rule making did not matter much as long as most regulation was of the rate-setting and permit-allocation types and hence relied largely on adjudication. However, with the growth of social regulation in the 1960s and 1970s, rule making (e.g., standard setting) became much more important. Thus, the courts began to develop a large body of new procedural rules and strict standards of judicial review for rule making proceedings. Finally, in the 1980s there were serious attempts to make the exercise of regulatory



discretion -- the residual category of what agencies do, which is neither adjudication nor rule making -- court-like as well (Shapiro 1988: 111). For example, agencies were required to justify their regulatory priorities or risk assessments through the use of cost-benefit or risk analysis (Greenwood 1984).

The progressive judicialization of regulatory proceedings makes the arguments in favor of an independent regulatory branch more plausible by making the agencies more and more court-like. After all, one of the most important characteristics of courts is their independence. If it is improper for a president or member of Congress to interfere with a judicial decision, the same ought to be true with respect to the decisions of a court-like agency. This does not mean, of course, that regulatory decisions should be taken in a political and institutional vacuum. The authority of Congress to define broad policy objectives and the responsibility of the president to coordinate the entire regulatory process to ensure internal coherence, are not questioned. Rather, the advocates of an independent fourth branch, but also some supporters of stronger presidential control like Cass Sunstein, favor a bigger role for the courts in controlling agency discretion through procedural and substantive review of rule making (Ackerman and Hassler 1981; Shapiro 1988; Edley 1990; Sunstein 1990; Rose-Ackerman 1992).

If a pro-deregulation president can mount a frontal assault on social regulation, and if members of Congress are too concerned with their own re-election to worry about the coherence of statutory programs, only the courts can provide the necessary continuity of the regulatory process. They, more than any other branch of government, are committed to preserving continuity of meaning in statutory law. What is suggested here is a partnership between regulatory agencies and courts. By both procedural and substantive means, but especially by statutory interpretation, the courts should insist that regulators continue to pursue with vigor the objectives set by Congress in the 1960s and 1970s, even when other political forces try to use recently elected members of Congress and presidents to cut back on regulation in the name of economic development (Shapiro 1988: 127). In return, judges should protect the independence of the regulators.

But what about political accountability? Is government by judges and technocratic experts compatible with democratic principles? The writers considered here are quite aware of the importance of these questions, but they point out that government by elected politicians, too, suffers from a number of defects that have been extensively documented by public-choice theorists (Mueller 1989). For example, in seeking re-election, legislators engage in advertising and position taking rather than in serious policy making, or they design laws with numerous



opportunities to aid particular constituencies. In either case, re-election pressures have serious consequences for the quality of legislation. On the other hand, proregulatory scholars ask rhetorically, if the courts require the regulatory process to be open to public input and scrutiny and to act on the basis of competent analyses, are the regulators necessarily less accountable than elected politicians? (Rose-Ackerman 1992: 34).

Summarizing and simplifying a complex debate, one can identify three main schools of thought concerning the problem of political control of regulatory bureaucracies. Initially, pluralist theorists rejected as naive the New Deal assumptions that regulators are guided in their decisions by their conception of the public interest, and that their discretion is disciplined by scientific and technical expertise. Pluralists doubted the expertise of regulatory agencies and argued that independence from presidential control, combined with broad delegation of rule making power by Congress, led to the capture of the agencies by the most powerful and best organized private interests. Subsequent empirical research, largely inspired by agency theory and the new institutionalism, showed that, in fact, agencies are responsive, in varying degrees, to the wishes of their political principals, and especially to those of the legislators.

These findings seemed to vindicate traditional beliefs in the possibility of keeping bureaucracies politically

accountable. However, the value of agency responsiveness to political principals becomes questionable once it is realized that new political forces can put pressure on Congress and the president to cut back on social regulation in the name of economic development. Under such circumstances continuity with the policies of the past could be preserved only by reasserting the faith of the New Deal in the independence of the regulatory agencies. However, while New Dealers viewed the courts with suspicion, the new advocates of a fourth independent branch see judicial review as the most effective means to ensure the democratic accountability of the regulators.

## 6. Regulation in Europe

This debate on the independence and political accountability of regulators would be only of academic interest for non-Americans were not for the fact that administrative regulation -- economic and social regulation by means of agencies operating outside the line of hierarchical control or oversight ("tutelle") by the central administration -- is rapidly becoming the new frontier of public policy and public administration throughout the industrialized world. In Europe this development has become particularly noticeable in the last two decades. In France, for example, the expression "autorité administrative indépendante" was used for the first time by the law of 6 January, 1978 creating the



Commission Nationale de l'Informatique et des Libertés, but several independent regulatory agencies already existed prior to that date: the Commission de Contrôle des Banques created in 1941 and transformed into the Commission Bancaire by the law of 24 January 1984; the Commission des Opérations de Bourse (1967), whose powers have been significantly extended by the law of 2 August 1984; the Médiateur (1973), the only single-headed regulatory agency created so far in France. Today there are some 17 independent agencies including, in addition to those already mentioned, the Commission d'Accès aux Documents Administratifs (1978), the Commission de la Sécurité des Consommateurs (1983) and the Commission de Contrôle des Assurances (1989) (Guédon 1991).

In Britain, too, the 1970s have been a period of significant institutional innovation, especially in the area of social regulation. The Independent Broadcasting Authority (1972), the Civil Aviation Authority (1972), the Health and Safety Commission (1974), the Equal Opportunities Commission (1976) and the Commission for Racial Equality (1976), are only some of the regulatory bodies created in this period (Baldwin and McCrudden 1987). Despite the hostility of Conservative governments toward any kind of "quangos", a number of independent agencies were set up also in the 1980s and early 1990s, partly because it was realized that in many cases privatization would only mean the replacement of public by private

monopolies unless the newly privatized companies were subjected to public regulation of profits, prices, and entry and service conditions. Thus the development of a whole new regulatory structure has paralleled the sale process of industries like British Telecommunications, British Gas and other public utilities. This structure rests on a body of economic law involving a large number of specific obligations and license conditions placed on the privatized industries, and on a new breed of regulatory agencies, the regulatory offices or ROs: Office of Telecommunications (1984), Office of Gas Supply (1986), Office of Water Services (1989), Office of Electricity Regulation (1990).

Parallel, if slower, institutional developments are taking place in all other European countries, so it is natural to ask what are the reasons for both the sudden growth of administrative regulation and the lateness of its arrival on the European political stage. Regulation, it has been said, is the new border between the state and the economy, and also the battleground for ideas on how the economy should be run (Veljanovski 1991: 4). Economic and social policies in the decades immediately following the end of World War II were legitimized by the widespread belief that government could control the economy by manipulating key macroeconomic variables and, at the same time, ensure social justice and greater equality in the distribution of wealth. But full employment and the welfare



state could be maintained only as long as the economy was expanding. The stagflation of the 1970s showed that growth could not be assumed; keynesianism was proclaimed dead. The rejection of demand management and "fine tuning" eroded the credibility of more direct forms of state intervention in the economy: nationalizations, municipalizations, industrial reorganizations, national or regional planning.

However, skepticism in the ability of the state to act as entrepreneur, planner, employer of last resort, and direct provider of services did not lead to demands for a return to laissez-faire, as the more radical advocates of privatization and deregulation seemed to expect. Instead, there was a demand for better focused and more flexible forms of public intervention, and for more attention to those areas of social regulation (environment, consumer protection, freedom of information) which were often neglected by the welfare policies of the past. Thus, paradoxically, the debate on privatization and deregulation contributed to directing the attention of European public opinion to regulation as a distinct mode of policy making aimed at correcting specific types of market failure like monopoly power, negative externalities and inadequate or asymmetrically distributed information (Majone 1991).

Of course, the interventionist policies of the past had attempted to solve many of the same regulatory problems, but the traditional solutions tended to be much less precise than those provided by administrative

regulation. For example, nationalization (or municipalization) has been in most countries of Europe the functional equivalent of American-style regulation in such key areas as transportation, telecommunications and public utilities. This functional equivalence is so close, in some respects, that it is possible to establish a one-to-one correspondence between typical forms of regulatory failure and certain well-known problems of public ownership, as in the following table (Majone and La Spina 1992: 261).



| Failures of Economic Regulation                            | Failures of Nationalized Industries   |
|--|---|
| Capture by regulated firms                                 | Capture by politicians and trade unions   |
| Overcapitalization (Averch-Johnson effect)                 | Overmanning   |
| Anticompetitive regulation                                 | Public monopolies   |
| Vague objectives ("regulate in the public interest")       | Ambiguous and inconsistent goals given to public managers   |
| Poor coordination among different regulators               | Poor ( <u>ex ante</u> and <u>ex post</u> ) coordination among public enterprises                          |
| Problem of political accountability of regulatory agencies | No effective control over public enterprises either by Parliament, the Courts, or the sponsoring minister |

Table 1: Comparing Two Types of Government Failure

Probably because of these similarities, some economists have argued that there is no great difference between public monopolies, like the PTTs, and privately owned but publicly regulated monopolies, like American Telephone and Telegraph before deregulation. However, the purpose of public ownership was not simply to control prices, conditions of entry or quality of service, but also to achieve many other goals like economic development, technical innovation, personal or, more commonly, regional income redistribution, and national security (Ambrosius 1984). While nationalizations and other traditional forms of direct state intervention were justified by a variety of often conflicting goals, regulation has a

single normative justification: improving microeconomic efficiency by correcting some specific form of market failure. Note that this justification applies not only to economic, but also to social regulation. Thus, the purpose of environmental regulation is to reduce negative externalities caused by pollution: microeconomic efficiency is increased by reducing the difference between the private and the social cost of pollution.

The adoption of microeconomic efficiency as the main normative criterion has several important consequences. It implies, for example, that regulatory instruments should not be used to achieve redistributive or other social policy goals (Majone 1993). The institutional implications are particularly relevant to our discussion. The use of specialized, single-purpose agencies is an obvious consequence of the focused approach characteristic of regulation. Also in this respect, there is a striking difference between the American approach and the organizational solutions of the past in Europe. Here, even when traditional techniques of administrative regulation were used, such as entry and price regulation, standard setting, or licensing, there was a general reluctance to rely on specialized, single-purpose or single-industry regulatory agencies. Instead, important regulatory functions were assigned to some obscure office buried in the bowels of a large ministry, or to an inter-ministerial committee effectively protected from any kind of



judicial review or independent scrutiny. Hence the low visibility of regulatory policy making in Europe.

The reasons for the reluctance to set up independent agencies varied according to different constitutional, political and administrative traditions, but the net result was everywhere the same: a serious mismatch between the increasingly specialized functions of government and the administrative instruments at its disposal. Only after the mismatch became too obvious to be overlooked did European scholars begin to produce functional justifications for the rise of independent regulatory agencies. These justifications are strongly reminiscent of the arguments of earlier American writers. Thus it is said that agencies are justified by the need of expertise in highly complex or technical matters, combined with a rule making or adjudicative function that is inappropriate for a government department or a court; that an agency structure may favor public participation, while the opportunity for consultations by means of public hearings is often denied to government departments because of the conventions under which they operate; that agencies' separateness from government is useful whenever it is hoped to free government administration from partisan politics and party political influence. Agencies are also said to provide greater continuity and stability than cabinets because they are one step removed from election returns; and the exercise of a policy making function by an administrative agency should provide flexibility not only in policy formulation but also in

the application of policy to particular circumstances. Finally, it is argued that independent agencies can protect citizens from bureaucratic arrogance and reticence, and are able to focus public attention on controversial issues, thus enriching public debate (Baldwin and McCrudden 1987: 4-9; Teitgen-Colly 1988: 37-47; Vesperini 1990: 415-19; Guédon 1991: 16-27).

The growth of administrative regulation in Europe owes much to these newly articulated perceptions of a mismatch between existing institutional capacities and the growing complexity of policy problems: policing financial markets in an increasingly interdependent world economy; controlling the risks of new products and new technologies; protecting the health and economic interests of consumers without impeding the free flow of goods, services and people across national boundaries; reducing environmental pollution. It is sufficient to mention these problems such as these to realize how significant is the supranational dimension of the new economic and social regulation. Hence the important role of the European Community in complementing the regulatory capacities of the member states.

For reasons I have discussed elsewhere (Majone 1992a, 1992b), the power of Community institutions does not rest, as in the member states, on the power of taxing and spending, but on that of rule making. In short, this is because the budget of the Community is very small -- less than 1.3 percent of the combined GDP of the member states even after the recent



approval of the "Delors II" package. In addition, more than 70 percent of this small budget is spent for the Common Agriculture Policy and a handful of redistributive programs. Given these constraints, the only way for the EC Commission to increase its influence is to expand the scope of its rule making. This it can do since an important characteristic of regulatory policy making is the limited influence of budgetary limitations on the activities of regulators. The size of non-regulatory, direct-expenditure programs is constrained by budgetary appropriations and, ultimately, by the size of government tax revenues. In contrast, the real costs of regulatory programs are borne directly by the firms and individuals who have to comply with them. This structural difference between regulatory policies and policies involving the direct expenditure of public funds is particularly important in the case of the Community, since not only the economic, but also the political and administrative costs of enforcing EC regulations are borne by the member states. This explains the continuous growth of Community rule making in practically every area of economic and social regulation. Because of the volume and depth of EC regulations it is impossible to discuss the issue of the political control of regulatory bureaucracies in Europe without taking also the supranational dimension into consideration.

## 7. Who Regulates the Regulators?

Given the growing importance of administrative regulation in Europe, a major challenge for legislators and policy makers is to avoid repeating the mistakes of the era of nationalizations when designing the new regulatory structures. The legislation which brought many large enterprises into public ownership after World War II typically prescribed objectives only in the most general terms and saw the role of the managers of nationalized enterprises as that of the trustees of the public interest. The managers were supposed to decide at arm's length from government, though certain powers of government over them were provided, notably power for the sponsoring minister to appoint board members and chairman, to issue general directions, and to approve investment plans.

In fact, ministerial interference in the day-to-day activities of the nationalized corporations was frequent and pervasive, but political pressures were applied through informal and usually secret processes. The ministerial power to give general directions, though little used for its true purpose, was often invoked as a means of escaping unpopular decisions (Wade 1988: 161). Parliaments, on the other hand, were seriously handicapped in controlling large public corporations by the lack of time, of expertise, and of reliable information. The reluctance of public managers to supply meaningful information was such a pervasive feature of nationalizations that already in 1951 W.Arthur Lewis could observe that less information was then published about the



British railways than was available before they were nationalized (W.Arthur Lewis 1951).

By the end of the 1970s the politicization of the nationalized industries, in the UK and elsewhere, was complete. The principle that they should operate independently of the government -- a principle reiterated by president Mitterand as late as 1983 when he asserted that "the nationalized industries should have total autonomy of decision and action" (Le Monde, 28 may 1983; cited in Hall 1986: 204) - - had been replaced by the practice of detailed ministerial intervention, particularly on pricing and personnel decisions.

Paradoxically, frequent political interference, exerted discreetly when not secretly, undermined the very principle of political accountability. Veljanovski's summary evaluation of the British experience is also valid for many other European countries:

The management of the nationalized industries and the rôle accorded to that most enigmatic of British political institutions, ministerial accountability, ensured that the political end of regulation was hidden behind the anonymity of central government departments. As part of their monopoly, the nationalised industries had regulatory functions combining the rôles of defendant, judge, jury and prosecutor in protecting their operations, especially from competition. Industries were subject to unclear and conflicting objectives, poor systems of control, and capture by trade unions and politicians (Veljanovski 1991: 6).

Unfortunately, old habits of secretiveness and ministerial interference seem to persist even after privatization. This happens for a variety of reasons, including the lack of a

tradition of regulation by independent agencies but also, as Prosser and others have argued, the unwillingness to learn from foreign, especially American, experiences. Serious flaws in the design of institutions to regulate the newly privatized industries can be detected in the choice of a non-participatory model, with none of the public hearings and other procedural characteristics of U.S. regulation; in the creation of a system of agencies linked to particular industries, rather than the pattern of commissions regulating a range of utilities in order to reduce the risk of agency capture; and in the fact that government departments still preserve important regulatory powers, so that the operations of agencies often are dependent on prior decisions of the minister laying down the principles to be applied. The danger is that these powers of direction "could be abused to exert behind-the-scenes pressure on the regulator in much the same way as pressure was put on the nationalized industries by government, precisely the situation which the privatization programme is supposed to render impossible " (Prosser 1989: 147).

In Britain the threat to the decision making autonomy of regulatory agencies is at least recognized and openly debated. In other countries the threat is equally serious, but there is, perhaps, less public awareness of it. Thus in France, the Minister of the Economy maintains important powers to regulate economic competition despite the creation in 1986 of the supposedly independent Conseil de la Concurrence. The Minister



remains the final decision maker in matters relating to mergers and acquisitions, and the power of investigating anti-competitive practices is still in the hands of the administration. Obviously, the government has kept for itself these important prerogatives in order to be able to deploy the "competition weapon", and especially the power to launch an investigation, in its dealings with economic interests. A good example of the prevalence of short-run political considerations over regulatory objectives is an early decision by the Conseil to dissolve the monopoly of the druggists over certain products, like cosmetics and baby milk, which could be sold anywhere without risks for the public health. The corporation of the pharmacists mobilized its political resources and the liberal government, which would normally have been expected to support greater economic competition, overrode the regulatory agency, reinstituting the druggists' monopoly over the small range of products not already covered by law (Demarigny 1993).

Although the German Bundeskartellamt is an older and more powerful agency than the Conseil de la Concurrence (it can, for example, undertake investigations into anti-competitive practices), it too is subject to ministerial decisions. Thus, in 1989 the agency opposed the merger of Daimler Benz with the Messerschmidt-Bölkow-Blohm Company on the ground that the new group would have a dominant position in several industries ranging from defense electronics to aerospace and transportation. Despite the clear danger of a distortion of

competition in important markets, the Minister of the Economy overrode the Bundeskartellamt allowing the merger to take place, subject to some conditions, in the name of industrial policy.

In sum, the issue of the independence of regulatory agencies, and the correlative problem of their political control and democratic accountability, are yet far from being resolved. Such agencies are still "constitutional anomalies which do not fit well into the framework of controls, checks and balances" (Veljanovski 1991: 16). Citing article 20 of the Constitution of 1958: "Le gouvernement ... dispose de l'Administration .... Il est responsable devant le Parlement...", a French author points out that the creation of independent regulatory bodies "met en cause des principes essentiels de notre droit: le principe de démocratie d'une part, le principe de l'Etat de droit d'autre part" (Teitgen-Colly 1988: 49). To be sure, it is no easy task to fit the new institutions into the constitutional framework of countries where the diffraction of state power is seen as a direct challenge to parliamentary sovereignty or to the principle of a rigid separation of powers. Expressed in traditional terms the dilemma is: either the regulatory agencies are part of the state administration, and then they cannot be independent; or else they are independent, but in this case to whom are they accountable?

It is impossible to escape this dilemma without questioning the relevance of traditional notions like the



constitutional axiom of the tripartite separation of powers, or the political principle that governmental policy making ought to be subject to control by persons accountable to the electorate. Is the trilogy of state powers a necessary and sufficient condition for the preservation of liberty, or should one rather think in terms of "separated institutions sharing power" (Neustadt 1960)? As for the political control of policy making, one should bear in mind that in Europe neither prime ministers or chancellors nor their cabinets are directly responsible to the electorate. It is certainly not coincidental that similar issues are being raised in the ongoing debate about the proper scope of judicial review and judicial policy making. The rise of judicial review in Europe shows that the triad of government powers is no longer considered an inviolable principle. At the same time, courts find their policy making role enlarged by the public perception of them as guarantors of the substantive ideals of democracy when electoral accountability in all spheres of government seems to be waning (Volcansek 1992: 5). What connects the discourse about administrative regulation with that about judicial review and policy making is the issue of the role of non-majoritarian institutions in democratic societies.

Concerning the regulatory agencies, an important lesson from the American experience is that even formal independence from executive power (as in the case of the ICRs) does not necessarily imply weak accountability. As we saw, agency

decisions tend to respond to the political preferences of the legislators and of the chief executive. Given the variety of instruments of control and persuasion available to Congress and the president, this finding is not surprising but it does challenge the validity of complaints about "a headless fourth branch of government". Rather than weak accountability, the danger is that the continuity, coherence and expertise of regulatory policy making may be compromised by too much attention to political expediency.

In addition to congressional and presidential oversight, we also noted the role of the courts and of the Administrative Procedures Act in defining what constitutes regulatory due process. Agencies may make major decisions only after giving advance notice through publication in the Federal Register, and allowing affected parties to present argument and evidence for and against agency proposals. The agency must give reasons for its action and publicly present evidence in support of its final decision. There must be a separation between those who prosecute a case of regulatory violation from those who make the decision. Courts may review an agency's decision to determine both whether the decision can be objectively supported as rational and whether it has been reached through fair procedures. The trend now is in the direction of substantive, rather than merely procedural, judicial review, with the Courts demanding that all significant questions be answered, rather than that all groups be responded to.



In short, what the American experience teaches us is that a highly complex and specialized activity like regulation can be monitored and kept politically accountable only by a combination of control instruments: legislative and executive oversight, strict procedural requirements, public participation and, most importantly, substantive judicial review. Measured against these standards, regulation in Europe is seen to be highly discretionary, suffering from weak accountability to Parliament, weak judicial review, absence of procedural safeguards, and insufficient public participation (Baldwin and McCrudden 1987; Prosser 1989; Veljanovski 1991).

These problems are particularly visible at the EC level precisely because of the importance of regulatory policy making in the Community system (see section 6). There are compelling reasons why member states will continue to delegate important regulatory powers to the EC, regardless of the progress made toward political union. If national regulators were willing and able to take into account the international repercussions of their policy choices; if they had perfect information of one another's intentions; and if the cost of organizing and monitoring policy coordination were negligible, international market failures could be managed by a series of intergovernmental agreements without the necessity of delegating regulatory power to a supranational level. However, since these conditions are never satisfied, successful coordination of national regulations is extremely difficult. In the context of EC institutions, coordination means joint

and interdependent actions without legal force: renegers cannot be taken to the European Court of Justice.

Among the many reasons why coordination of national regulations is so difficult (Majone 1992a), one deserves special attention. As we have seen, regulators need a considerable amount of discretion both in rule making and in enforcement. Because regulators lack information that only regulated firms have, and because governments are reluctant, for political reasons, to impose excessive costs on industry, bargaining is an essential feature of regulatory enforcement. Bargaining being so pervasive, it is extremely difficult for an outside observer to determine whether the spirit of an intergovernmental regulatory agreement was violated. When it is difficult to observe whether states are making an honest effort to enforce a cooperative agreement, the agreement is not credible. Hence even the limited monitoring capacities of the EC Commission make Community regulations more credible than intergovernmental agreements.

Sometimes member states have problems of credibility not just in the eyes of each other as in the Prisoners' Dilemma situation where defecting is the dominant strategy, but in the eyes of third parties, such as regulated firms or governments outside the Community. For example, where pollution has international effects and fines impose significant competitive disadvantage on firms that compete internationally, firms are likely to believe that national regulators will be unwilling to prosecute them as rigorously if they determine the level of



enforcement unilaterally rather than under supranational supervision. Thus the transfer of regulatory powers to the EC Commission, by making more stringent regulation credible, may improve the behavior of regulated firms. Also, since the Commission is involved in the regulation of a large number of firms throughout the Community, it has much more to gain by being tough in any individual case than a national regulator: weak enforcement would destroy its credibility in the eyes of more firms. Thus it may be more willing to enforce sanctions than a member state would be, even if its direct costs and benefits of doing so are no different (Gatsios and Seabright 1989: 49-50). The fact that the Commission regulates a large number of firms throughout the Community also makes it less likely to be captured by a particular firm or industry than a national regulator.

For all these reasons the importance of Community regulation will continue to increase. Hence, finding solutions to the problems of political control and democratic accountability of EC policy making becomes even more urgent than at the national level. Unfortunately, the usual arguments about the democratic deficit of Community institutions fail to take into consideration the particular role of the Commission as regulator. As our analysis shows, the comparative advantage of EC regulation lies in large measure in the relative insulation of the "Eurocrats" from the electoral cycles and political considerations which dominate national policy making. In Madison's terminology, the insulation of the

Commission may be an important safeguard against national and sectoral "factionalism". Many of the arguments of the American advocates of an independent fourth branch of government (see section 5) apply, mutatis mutandis, in the context of the European Community and its member states. Hence any proposal to improve the democratic legitimacy of European institutions should acknowledge the significance of non-majoritarian institutions like courts and independent agencies as countervailing powers against some of the less attractive tendencies of representative democracy. It is also necessary to accept the fact that the traditional means of political control will not be available for quite some time at Community level.

This does not mean, however, that without a radical constitutional transformation nothing can be done to improve the legitimacy of Community policies. This kind of radicalism has been one of the most serious mistakes of the federalist movement. Instead, in line with what has been said above about the need to use a variety of instruments to discipline regulatory discretion, one should approach the control problem from different directions. One of the advantages of this method is that partial solutions discovered at the Community level may be applicable also at the national level where, as we saw, the accountability of regulators is still an open issue.

As an example of improvements that could be usefully introduced at both levels consider the idea of a "regulatory



clearing house". It will be recalled that the size of regulatory programs is not significantly constrained by budgetary appropriations, as in the case of direct-expenditure programs. This absence of a regulatory budget process is the root cause of both economic inefficiency and inadequate political oversight. No mechanism exists for regulation that requires policy makers throughout the government to solve the two-level budget problem -- how much to spend during a given period and then how to allocate this total amount among alternative uses -- which is addressed by any government in its direct-expenditure activities (Litan/Nordhaus 1983). The absence of a central political authority in the Community further complicates the problem, so that regulatory issues are dealt with sector by sector, with little attempt to achieve overall policy coherence. Even within the same sector, it would be difficult to maintain that regulatory priorities are set in a way that explicitly takes into consideration either the urgency of the problem, or the benefits and costs of different proposals. As I have suggested elsewhere (Majone 1989b), coordination could be improved by setting up a "regulatory clearing house" located at the highest level of the Community bureaucracy. Directorates-General (DGs) would be asked to submit annually draft regulatory programs for review. When disagreements or serious inconsistencies arise, the president of the Commission or a "working committee on regulation" would be asked to intervene. By extending centralized control over the regulatory agenda of the DGs

responsible for closely related areas such as environment, health and safety at work, consumer protection and food and drug regulation, this review process would help the Commission shape a consistent set of measures to submit to the Council and the Parliament. Simultaneous consideration of all new regulations in a given area would also facilitate assessment of their joint impact on particular industries and on European consumers and the economy as a whole. Similar procedures could obviously be introduced also by the member states.

Broader procedural reforms should also be possible. It is well known that the Treaty of Rome does not structure the executive power of the Community in a single way, applicable to all instances of legislation needing further execution. Instead, it has been left to the Council, in its capacity as legislative decision maker, to organize, case by case, the executive process (Lenaerts 1991). This ad hoc approach is the very negation of the idea of transparency which plays such a large role in the current discussion of regulation. The adoption of something like an Administrative Procedures Act for the European Community could do more to make public accountability possible than the wholesale transfer of traditional party politics to Brussels.



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